No. 14091

United States Court of Appeals

For the Ninth Circuit

PEDRO DIAZ-MONTERO, *Appellant*,

vs.

HERBERT BROWNELL, Attorney General of the United States, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The appellant filed his petition herein under the Declaratory Judgment Act, 28 U.S.C.A. 2201 (See Appendix A) in the United States District Court for the Western District of Washington, Northern Division, on September 22, 1952 (Tr. 6). Final order dismissing appellant's petition was entered on August 3, 1953 (Tr. 12 and 13). Notice of appeal was filed September 21, 1953 (Tr. 13) and cost bond September 29, 1953 (Tr. 14).

The order of dismissal entered herein is final and appealable. *Sardo v. McGrath*, 196 F.2d 20 (D.C.)

Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Sec. 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

STATEMENT OF THE CASE

Suit was brought in the District Court by the appellant under the Declaratory Judgment Act, 28 U.S. C.A. 2201 for judgment of the District Court, suspending his deportation from the United States, or in the alternative, requiring the appellee to suspend appellant's deportation, or accord him a further hearing upon the same. The petition also contained a prayer for general relief. The petition was dismissed *prior to hearing* on motion of the appellee, and the only question presented is the sufficiency of the petition to entitle the appellant to a *hearing* on the question of the relief prayed for under the Declaratory Judgment Act. *The sole ground for dismissal is that appellants sole remedy is by habeas corpus.*

The background of this case is undisputed and is the following:

The appellant, an unmarried man and a citizen of Mexico, was legally admitted to the United States on June 29, 1943, as an agricultural contract laborer and has since that time resided here continuously. In August of 1951, the appellant was ordered deported by the immigration service at Seattle, Washington, because of the fact that he had admitted having committed adultery with an American citizen. The appellant thereupon appealed to the respondent for suspension of deportation under U.S.C.A. Title 8, Sec. 155c (See Appendix B) which provides for suspension of deportation of an alien of good moral character who has resided continuously in the United States for seven years or more. Upon the appellant's appeal to the Board of Immigration Appeals, the

Board found *specifically* that the appellant was a person of good moral character and had resided in the United States seven years, and *suspended* the order or warrant of deportation but not in accordance with U.S.C.A. Title 8, Sec. 155c, and instead held that the appellant should depart from the United States within a time certain or the warrant would be reinstated. The appellant thereupon filed his petition herein, alleging in some detail the foregoing facts (Tr. 3-6). On November 12, 1952, the appellee filed an answer, setting up three defenses, namely (1) lack of jurisdiction of the District Court over the Attorney General; (2) failure of the petition to state a claim upon which relief can be granted; and (3) a series of allegations admitting and restating in further detail the facts stated in the petition (Tr. 6-8). On March 25, 1953, the appellee filed a motion to dismiss on the sole ground of *Heikkela v. Barber*, 345 U.S. 1, 73 S. Ct. 603 (Tr. 9). On August 3, 1953, the court granted the appellee's motion to dismiss without hearing evidence and granted final judgment of dismissal in favor of the appellee and against the appellant, on the sole ground of *Heikkela v. Barber*, *supra* (Tr. 12 and 13). This appeal results.

SPECIFICATION OF ERRORS

The District Court erred in:

1. Granting the appellee's motion to dismiss and in dismissing the petition filed herein without hearing the evidence.

2. Rendering judgment in favor of the appellee and against the appellant.

3. Holding that the appellant was not entitled to relief under the Declaratory Judgment Act and that his sole remedy was by habeas corpus.

4. Holding that the case of *Heikkela v. Barber*, *supra*, was controlling and basing his order of dismissal on that case.

SUMMARY OF ARGUMENT

The *Heikkela* case, *supra*, which formed the sole legal basis for the order of dismissal appealed from (according to the terms of the order itself) is not in point as will be demonstrated by analysis. The appellant is entitled to relief under the specific provisions in the Declaratory Judgment Act, 28 U.S.C.A., Sec. 2201, and under the doctrine announced by the Supreme Court in the case of *McGrath v. Kristensen*, 340 U.S. 162, 71 S.Ct. 224. Pertinent sections of statutes cited are set forth in appendices hereto.

ARGUMENT

The facts stated in the petition are not disputed. These should be considered at the very outset in connection with a reading of the Declaratory Judgment Act (Appendix A). Since all assignments of error relate to substantially the same thing they will be discussed under one heading.

The appellee states that this case is controlled by *Heikkela, supra.* Let us analyse it: Heikkela, *who then had an order of deportation outstanding against him,* brought an action in the District Court for the Northern District of California, seeking "review of agency action" which had resulted in issuance of a

deportation order *then in force.* The question presented was whether such *outstanding* order could be attacked by any means other than habeas corpus. The Supreme Court held that *outstanding* deportation orders could be reviewed only by habeas corpus. *Heikkela had made no application for suspension of deportation* as has the appellant in the instant case, and Heikkela's attack was directly upon the order of deportation, and *not* upon the refusal of the Attorney General to suspend deportation. Nor had the Attorney General, or the Board of Special Inquiry suspended the order of deportation and granted voluntary departure in the *Heikkela* case as it has in the instant case.

Therefore, there are two important distinctions between Heikkela and the appellant. (1) Heikkela had an order of deportation *outstanding* against him and had sought to attack such *order*, and (2) Heikkela made no application for suspension and the validity of the Attorney General's refusal to consider suspension of deportation was *not* an issue as it *is* here.

The case of *McGrath v. Kristensen, supra,* is controlling here, and the facts of that case are briefly the following:

Kristensen, an alien, was legally admitted to the United States but violated his visitor's rights and was ordered deported. Just as in the instant case, Kristensen made application for suspension of his deportation under 8 U.S.C.A., Sec. 155c. The Attorney General refused to suspend deportation and suit was brought under the Declaratory Judgment Act, *supra,* just as in the instant case. The Supreme Court, in

its opinion, clearly stated the question involved when it said, at page 229:

> *"However, the Government does contend that the Immigration Act provision, Sec. 19(a), making the Attorney General's decision on deportation 'final' precludes judicial review except by habeas corpus of his refusal to grant suspension of deportation. The procedural question as thus narrowed is whether an administrative decision against a requested suspension of deportation under Sec. 19(c) of the Immigration Act can be challenged by an alien free from custody through a declaratory judgment or whether, to secure redress, he must await the traditional remedy of habeas corpus after his arrest for deportation."* (Italics ours)

In determining that it had jurisdiction to review the refusal of the Attorney General to suspend deportation, the court said:

> *"This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts,* 28 U.S.C., Sec. 1331, 28 U.S.C.A., Sec. 1331, and the terms of the Declaratory Judgment Act, 28 U.S.C., Sec. 2201, 28 U.S.C.A., Sec. 2201." (Italics ours)

So in the instant case there is an actual controversy between the alien and the immigration officials over the legal right of the alien to be considered for suspension. The appellant was held by the appellee to be a person of good moral character when he said, "We do not believe that this single lapse (when appellant

committed adultery) should preclude us from making a finding of good moral character." That the appellant had lived continuously in the United States for more than seven years was also conceded (Tr. 3 and 4). The appellant was therefore eligible under law for suspension of deportation, but the appellee refused to consider the petition for suspension and gave no reason for his order *in spite of the fact that the appellee made specific findings which would entitle the appellant to suspension* in the absence of other factors. No such factors appear. No reasons were given. It is, therefore, apparent that the appellee has refused to consider the appellant's application *on its merits*, just as did the immigration authorities in the *Kristensen* case and accordingly, this cause comes squarely under that case.

In concluding, it is interesting to note that the court in Heikkela, took pains to distinguish Kristensen when it said:

> "Heikkela suggests that *Perkins v. Elg*, 1939, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320 (declaratory and injunctive relief), and *McGrath v. Kristensen*, 1950, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173 (declaratory relief), were deviations from this rule. But neither of those cases involved an outstanding deportation order. Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L. Ed. 938. And Kristensen's ineligility for naturalization was set up in contesting the Attorney

General's refusal to suspend deportation proceedings under the special provisions of Sec 19(c) of the 1917 Immigration Act, as amended 8 U.S.C.A., Sec. 155(c). *Heikkela's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within Elg or Kristensen.'* (Italics ours)

SUMMARY AND CONCLUSION

It is apparent from the petition and the law in such cases that the appellant here is entitled to a hearing upon the question of his right to be considered for suspension, and that the immigration officials' refusal to suspend deportation in view of *their own findings* is, in fact, a refusal to consider suspension just as in the *Kristensen* case, and constitutes an arbitrary and unfair disposition of the appellant's rights under 8 U.S.C.A. Sec. 155c, and the appellant is therefore entitled to relief under the Declaratory Judgment Act, *supra* and to a hearing upon his petition. The petition, therefore, should not have been dismissed, and this case should be remanded to the District Court for hearing upon the petition. *Kristensen v. McGrath, supra.* U. S. Court of Appeals Opinion, 179 F.2d 796; *Sardo v. McGrath, supra.*

Respectfully submitted,

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Attorneys for Appellant

APPENDIX A

Title 28, Sec. 2201. Creation of remedy:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shal be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Sec. 111, 63 Stat. 105.

Sec. 2202. Further relief:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

APPENDIX B

Title 8, U.S.C.A., Sec. 155(c), as amended by Public Law 863—80th Congress, Chapter 783-2d Session.

AN ACT

To amend subsection (c) of section 19 of the Immigration Act of 1917, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 19 of the Immigration Act of February 5, 1917, as amended (54 Stat. 671; 56 Stat. 1044; 8 U.S.C. 155(c), is further amended to read as follows:

"(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *"

Approved July 1, 1948.

Note: Since Public Law 414-82d Congress, Chap. 477-2d Session, above provision appears in substance under U.S.C.A. Title 8 §1254.